IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SMALL BUSINESS LEGISLATIVE COUNCIL

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MOTION OF SMALL BUSINESS LEGISLATIVE COUNCIL FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Small Business Legislative Council (SBLC) hereby moves, pursuant to Rule 42, Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae* in support of the rulings of the Federal Trade Commission and the opinion of the United States Court of Appeals for the Second Circuit, in the above-captioned proceedings. Consent to the filing of this brief *amicus curiae* has been withheld by counsel for the Great Atlantic & Pacific Tea Company.

Small Business Legislative Council is affiliated with the National Small Business Association, a non-profit, tax-exempt trade association organized and operating under the laws of Ohio, whose purpose is to represent and serve the needs of its constituent members before Congress and agencies of the federal government. The SBLC membership is comprised of a broad spectrum of industries and associations which constitute a substantial and representative portion of the small business community of this country.

The accompanying brief urges this Court to uphold the decision of the United States Court of Appeals for the Second Circuit and by so doing, to reaffirm its commitment to enforcement of one basic component of our antitrust laws, Section 2 of the Clayton Act, as amended. Small Business Legislative Council believes it can bring to this case a perspective — not fully represented by the parties — which may assist this Court in its consideration of the case.

Accordingly, SBLC respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Small Business Legislative Council is affiliated with the National Small Business Association, a trade organization whose membership is comprised of various segments of the small business community.

SBLC was organized in 1977 for the sole purpose of bringing to the attention of Congress and federal instrumentalities, including this Court, the common concerns of the small business community with respect to issues affecting the survival, competitiveness, and growth of the small business sector of the American

economy. The issues in this case typify the issues in which SBLC becomes involved. The 56 associations which are members of SBLC (Appendix A) represent manufacturing, wholesaling, retailing, service, construction, the professions — in fact more than 1,000 of the 1,200 Standard Industrial Classifications established by the Department of Commerce. Each SBLC member represents predominantly small business. In fact, the SBLC By-Laws require that, to be eligible for membership, 70 percent of the dues income of the member association be derived from firms classified as small under size standards established by the Small Business Administration. Thus, SBLC membership represents approximately 4 million small business firms.

SBLC appears frequently through counsel at appropriate Congressional hearings to offer the perspectives of small business with respect to the competitive advantages to the national economy inherent in vigorous and active enforcement of the antitrust laws — most particularly the discriminatory pricing prohibitions in the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. § 13. In a variety of ways, SBLC has expressed support for and urged that the Federal Trade Commission be committed to the uninhibited exercise of its statutory powers as bestowed under the laws relating to discriminatory pricing.

This Court has undoubtedly noticed the determined campaign by certain high ranking officials in the Department of Justice, beginning in 1972, to seek

the outright repeal or emasculation by amendments of the Robinson-Patman Act. Many SBLC members vigorously countered this campaign. It is recognized that their efforts both in the legislative and executive branches of our government brought to a halt the anti-Robinson-Patman campaign.

Much of the four decades of history of the Robinson-Patman Act could be characterized as ineffective enforcement by the agencies of government and weakening the Act's force and effect by court decisions. This case now comes full circle in spelling-out the central concerns so persuasive to Congress forty-two years ago in its enactment of Robinson-Patman, namely: when preferences are granted suppliers after powerful buyers pressure them, equality of opportunity is denied to small business competitors.

The interest of the SBLC membership in this case is not in the economic health *per se* of two titans, A & P and Borden, but rather in the fall-out from this case if the decision of the United States Court of Appeals for the Second Circuit is not upheld. Any expansion of the "meeting competition" defense cannot help but further weaken the competitive position of the small business community.

It is the large firm, not the small firm, that invariably receives discriminatory price reductions. This advantage, coupled with the "deep pocket" market power already enjoyed by the large firm, contributes to even greater concentration and deprives the country of one essential check to monopoly: the existence of an active, growing, viable small business sector.

Vitally affected by the decision in this case is the very foundation of private enterprise: the small nurseryman, the steel distributor, the bookseller, the baker, the candy wholesaler, the menswear retailer, the retail druggist, the dealer in office machines of hardware or shoes or tires—in fact for the 98 percent of all enterprises in America who make jobs for almost 60 percent of the nation's private, non-agricultural work force.

Because Robinson-Patman and its parent, the Clayton Act, were designed to check monopoly in its incipiency, this case presents another opportunity for this Court to serve the public interest by affirming the policies underlying the Robinson-Patman Act so that small business be permitted to compete fairly and effectively based on efficiency, against the size and power of its larger industrial counterparts as purchasers of goods and services in the marketplace.

STATEMENT

The case presents a classic illustration of the overreaching buyer whose purchasing power enables it to extract discriminatory prices from a dependent seller at the expense of other smaller buyers. The economic evils associated with the overt anticompetitive practices of the large chain stores, including A & P, of acquiring unlawfully preferential prices from vendors whose economic existence is largely dependent upon these predatory buyers,

caused Congress to amend the Clayton Act so as to include Section 2(f) thereof, commonly known as the "buyer inducement" provision of the Robinson-Patman Act.

Although the Robinson-Patman Act has not been without critics since its enactment into law in 1936, its efficacy as a significant piece of federal regulatory legislation has been recognized repeatedly by this Court over the years, and most recently in *Exxon v. Maryland*, ____ U.S. ____, 57 L.Ed. 2d 91, 98 S.Ct. ____ (June 14, 1978).[1]

A & P now comes before this Court, in an effort to have engrafted onto Section 2(b) of the Act an addition which would, in effect, fatally undermine the buyer liability provisions embodied in Section 2(f) of the Act. According to A & P, a buyer who is charged with a 2(f) violation for knowingly inducing or receiving a price discrimination should be permitted to successfully invoke the "meeting competition" defense normally

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[1] *Exxon* involved a challenge to a Maryland statute on various grounds, among them that it was in conflict with Section 2(b) of the Robinson-Patman Act, the statutory "meeting competition" defense. In holding that the Maryland Statute was not pre-empted by Section 2(b), this Court rejected Exxon's argument that 2(b) established a federal right to engage in discriminatory pricing in certain situations in stating: "The proviso in § 2(b) of the Robinson-Patman Act is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, *it defined a specific, limited defense, and even narrowed the good-faith defense that had previously existed* [under Section 2 of the original Clayton Act]." (Emphasis added).

raised by a seller charged with 2(a) liability even when that buyer *knew for a fact* the pricing offer he induced from the seller *by way of deception and misrepresentation* was substantially lower than the only other competing offer. As already decided by the Federal Trade Commission and affirmed by the United States Court of Appeals for the Second Circuit, there is simply no basis in law or reason for this novel and somewhat surprising assertion.

Nobody would quarrel with the legitimacy of the rule that a buyer is not liable under Section 2(f) if he is unaware that the lower price he induces cannot be protected by the meeting competition defense. Indeed, this Court so held in *Automatic Canteen Co. of America v. Federal Trade Commission,* 346 U.S. 61, 74 (1953). Likewise, a seller's exoneration from 2(a) liability via a successful meeting competition defense does not necessarily absolve a buyer from 2(f) liability, if the *buyer* knows that the induced discriminatory price is not *in fact* sheltered by the meeting competition defense. *Kroger Co. v. Federal Trade Commission,* 438 F.2d 1372, 1377 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971).

Economic realities provide logical support for the rule articulated in the *Kroger* case. As expressed by the Federal Trade Commission in its opinion in the instant case, proof of a seller's bad faith is not a prerequisite to a finding that the meeting competition defense is unavailable to a buyer — precisely because the buyer is frequently better positioned to ascertain whether or not the defense is properly maintainable by the seller.

See, e.g., Automatic Canteen, supra, at 79 n. 23. It is not difficult to conceive a situation where a seller, under extreme pressure to accommodate a buyer whose economic power in the market for the purchased product is demonstrably greater than that of his smaller competitors, offers a price to that buyer believing in good faith that such offer meets competition, when in reality the buyer is in sole possession of the information which would determine if the seller has met or beaten competition. The instant case is such a situation, and was so recognized by both tribunals which have already ruled that A & P knew that Borden's final bid substantially bettered the bid of Borden's only other competing seller, Bowman Dairy.[2] Moreover, the Court of Appeals correctly identified A & P as "one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of 'meeting competition' and went a long way below it." (Pet. Brief, 19a).

Notwithstanding the evidence adduced below that A & P's egregious conduct as the "principal malefactor" in its negotiations with Borden brought this case

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[2] *Automatic Canteen, supra,* at 79 also emphasized the need to look behind the formalistic approach which A & P adopted below and reasserts before this Court:

> "If the requirement of knowledge in § 2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices."

squarely within the parameters of the *Kroger* case, A & P still maintains that it was improperly deprived of the meeting competition defense. We submit that the reasoning of A & P in reaching this strained conclusion is spurious and circular. Stated simply, A & P argues that because Borden was not charged with a Section 2(a) violation and would have been able to successfully defend against that allegation on meeting competition grounds in any event (a conclusion clearly not supported by the findings of either the Federal Trade Commission or the Court of Appeals), it was error for the Court of Appeals to predicate A & P's 2(f) liability upon the *Kroger* case.

Rather, what occurred below was that the indefensible behavior of A & P in extorting a knowingly below-competition bid from Borden was found to be within the category of misconduct explicitly condemned by both *Kroger* and *Automatic Canteen*. Therefore, the rule that Section 2(f) liability is derivative from Section 2(a) liability was properly held to be inapplicable. Finally, the Court of Appeals held that the meeting competition defense was unavailable to A & P because its misconduct precluded A & P from wearing the good faith cloak under which A & P assumes Borden could have taken shelter —an assumption about which the Commission expressed grave doubts (Pet. Brief, 44a, n. 19).

Given these doubts, it is difficult to understand how A & P can blithely assert that the Court of Appeals "conceded the meeting competition defense to Borden" (Pet. Brief 24) when the only reference made by the

Court of Appeals to the availability of the defense to Borden was that "...Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid..." (Pet. Brief 19a). In characterizing Borden's state of mind as it did, the Court of Appeals merely adheres to the rule that the meeting competition defense requires more than conjecture on the part of the seller that it has met competition. Indeed, the defense calls for some factual basis for the seller's reasonable belief that his price would meet that of his competitor. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

Perhaps more important is the conclusion implicit in the Court of Appeals' treatment of Borden's state of mind that *whatever* Borden believed was irrelevant because A & P's statements of inducement to Borden that its initial offer was "not in the ballpark" and that a $50,000 reduction "would not be a drop in the pocket" were tantamount to affirmative misrepresentation. Accepting the contention of A & P that its intentions in making such statements to Borden should be judged only on the basis that they were literally true when made is to disregard plain fact. A & P was well aware of its superior bargaining power and ability to coerce discriminatory price concessions from Borden at the outset of the negotiations between the parties. A & P knew that the new dairy processing facility which Borden had just built in the Chicago area was largely dependent upon Borden's willingness to succumb to A & P's pricing demands — even if Borden had to beat its competition to do so.

From the point of view of *amicus*, the opinion of the Court of Appeals is most significant in its recognition of the competitive disadvantages imposed upon small business enterprises by large buyers that Section 2(f) of the Robinson-Patman Act was designed to prevent. As the Court of Appeals wisely points out, adoption of A & P's views regarding the buyer's use of the meeting competition defense would only serve to emasculate Section 2(f), and the following scenario would result:

> "...large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and meeting competition defenses, thus vindicate the final price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming market power to the large buyer, all to the competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers."

CONCLUSION

In light of the record of these proceedings, with special reference to the perceptive and accurate economic analysis of the United States Court of Appeals for the Second Circuit, it is respectfully suggested that the most appropriate action that could be taken by this Court in this matter would be to dismiss the Writ of Certiorari as having been improvidently granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

TRADE AND PROFESSIONAL ASSOCIATIONS COMPRISING THE SMALL BUSINESS LEGISLATIVE COUNCIL

American Association of Nurserymen
Washington, D.C.

Association of Diesel Specialists
Kansas City, Missouri

Association of Physical Fitness Centers
Bethesda, Maryland

Association of Steel Distributors, Inc.
Cleveland, Ohio

Automotive Warehouse Distributors Association, Inc.
Kansas City, Missouri

Building Service Contractors Association International
McLean, Virginia

Christian Booksellers Association
Colorado Springs, Colorado

Direct Selling Association
Washington, D.C.

Electronic Representatives Association
Chicago, Illinois

Independent Bakers Association
Washington, D.C.

Independent Sewing Machine Dealers of America, Inc.
Hilliard, Ohio

International Franchise Association
Washington, D.C.

Local and Short Haul Carriers National Conference
Washington, D.C.

Machinery Dealers National Association
Silver Spring, Maryland

Manufacturers Agents National Association
Irvine, California

Marking Device Association
Evanston, Illinois

Menswear Retailers of America
Washington, D.C.

Narrow Fabrics Institute, Inc.
New Rochelle, New York

National Association for Child Development & Education
Washington, D.C.

National Association of Brick Distributors
McLean, Virginia

National Association of Catalog Showroom Merchandisers
New York, New York

National Association of Independent Lumbermen
Arlington, Virginia

National Association of Men's and Boys' Apparel Clubs, Inc.
Atlanta, Georgia

National Association of Plastics Distributors, Inc.
Devon, Pennsylvania

National Ass'n of Plumbing-Heating-Cooling Contractors
Washington, D.C.

National Association of Realtors
Chicago, Illinois

National Association of Retail Druggists
Washington, D.C.

National Association of Trade & Technical Schools
Washington, D.C.

National Beer Wholesalers' Association of America, Inc.
Falls Church, Virginia

National Building Material Distributors Association
Chicago, Illinois

National Candy Wholesalers Association, Inc.
Washington, D.C.

National Concrete Masonry Association
McLean, Virginia

National Electrical Contractors Association
Bethesda, Maryland

National Family Business Council
West Bloomfield, Michigan

National Fastener Distributors Association
Columbus, Ohio

National Hay Association, Inc.
Jackson, Michigan

National Home Furnishings Association
Washington, D.C.

National Home Improvement Council
New York, New York

National Independent Dairies Association
Washington, D.C.

National Independent Meat Packers Association
Washington, D.C.

National Insulation Contractors Association
Washington, D.C.

National Office Machine Dealers Association
Zanesville, Ohio

National Office Products Association
Alexandria, Virginia

National Paper Trade Association, Inc.
New York, New York

National Parking Association
Washington, D.C.

National Patent Council
Arlington, Virginia

National Pest Control Association
Vienna, Virginia

National Precast Concrete Association
Indianapolis, Indiana

National Shoe Retailers Association
New York, New York

National Small Business Association
Washington, D.C.

National Society of Public Accountants
Washington, D.C.

National Tire Dealers & Retreaders Association, Inc.
Washington, D.C.

National Tcol, Die & Precision Machining Association
Washington, D.C.

Printing Industries of America, Inc.
Arlington, Virginia

Small Business Service Contractors Association
Washington, D.C.

The Roller Skating Rink Operators Association
Lincoln, Nebraska